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**FILED**

07CV6661
JUDGE HOLDERMAN
MAGISTRATE JUDGE NOLAN

NOV 2 7 2007   MB      Page 2

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT      NOV 2 7 2007

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

| United States District Court   NORTHERN | District .OF ILLINOIS | |
|---|---|---|
| Name (under which you were convicted):<br>FRANK RODRIGUEZ | | Docket or Case No.:<br>01-CR-567-2 |
| Place of Confinement:<br>FEDERAL CORRECTIONAL INSTITUTION-BECKLEY | | Prisoner No.:<br>13950-424 |
| UNITED STATES OF AMERICA<br><br>v. | Movant (include name under which convicted)<br>FRANK RODRIGUEZ | |

**MOTION**

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____
   UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

   (b) Criminal docket or case number (if you know): 01-CR-567-2

2. (a) Date of the judgment of conviction (if you know): APRIL 30, 2002

   (b) Date of sentencing: DECEMBER 17, 2002

3. Length of sentence: 180 months

4. Nature of crime (all counts): Count 1, Conspiracy to Possess w/Intent to Distribute More Than 50 Grams of Crack Cocaine; Count 2, Distribution of More Than 50 Grams of Crack Cocaine on June 7, 2001, in violation of 21 U.S.C. Sections 841(a)(1), 841(b)(1)(A) and 846.

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐      (2) Guilty ☒ X      (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A

6. If you went to trial, what kind of trial did you have? (Check one) N/A   Jury ☐   Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? N/A   Yes ☐   No ☐

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8.  Did you appeal from the judgment of conviction?                Yes ☒X    No ☐

9.  If you did appeal, answer the following:

    (a) Name of court: __U.S. Court of Appeals for the Seventh Circuit__

    (b) Docket or case number (if you know): __No. 02-4344__

    (c) Result: __Limited remand pursuant to U.S. v. Paladino, 401 F.3d 471 (7th Cir.2005).__

    (d) Date of result (if you know): __May 3, 2005__

    (e) Citation to the case (if you know): __U.S. v. Castillo, 406 F.3d 806 (7th Cir. 2005).__

    (f) Grounds raised: __Whether the district court erred in the written judgment when__
    __it ordered the Appellant repay $3,000 in restitution for buy-money when at__
    __sentencing the district court orally ordered that the $3,000 be repaid as a__
    __special condition of supervised relased and when it ordered Mr. Castillo ...__

    _____

    _____

    _____

    (g) Did you file a petition for certiorari in the United States Supreme Court?    Yes ☐  No ☒X

        If "Yes," answer the following:

        (1) Docket or case number (if you know): _____

        (2) Result: _____

        _____

        (3) Date of result (if you know): _____

        (4) Citation to the case (if you know): _____

        (5) Grounds raised: _____

        _____

        _____

        _____

        _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications
    concerning this judgment of conviction in any court?

        Yes ☐  No ☒X

11. If your answer to Question 10 was "Yes," give the following information:

    (a) (1) Name of court: _____

        (2) Docket or case number (if you know): _____

        (3) Date of filing (if you know): _____

        (4) Nature of the proceeding: _____

        (5) Grounds raised: _____

_____

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

      Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

    (1) Name of court: _____

    (2) Docket or case number (if you know): _____

    (3) Date of filing (if you know): _____

    (4) Nature of the proceeding: _____

    (5) Grounds raised: _____

_____

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_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

      Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

    (1) First petition:      Yes ❑ No ❑

    (2) Second petition:    Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

_____

_____

_____

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**GROUND ONE:**    INEFFECTIVE ASSISTANCE OF COUNSEL IN RELATION TO PLEA OF GUILTY TO A CRACK-COCAINE CONSPIRACY.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): My legal representative, Attorney Raul Villalobos, gave me advice to accept the terms of the Rule 11 Plea Agreement and to enter a plea of guilty to a conspiracy to distribute in excess of 50 grams of crack cocaine. This subjected me to a statutory mandatory minimum sentence of 10 years and a maximum of Life imprisonment. However, counsel did not make a good-faith effort to investigate all of the facts of my case. Had he properly investigated, he would have, or should understood that I never conspired with anyone to commit a distribution of crack cocaine. I did not involve my self with crack. I was not guilty of a crack conspiracy. (Please see Memorandum of Law)

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐    No ☒X X

(2) If you did not raise this issue in your direct appeal, explain why: My appellate counsel did not raise this claim on my behalf.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐    No ☒X X

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐    No ☐

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(4) Did you appeal from the denial of your motion, petition, or application? N / A

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

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**GROUND TWO:** DISTRICT COURT ERRED IN APPLYING SENTENCE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE AND APPELLATE COUNSEL INEFFECTIVE FOR FAILURE TO RAISE CLAIM.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The letter I directed to Britane Nathan did not, and could not be shown to, obstruct the investigation, prosecution, or sentencing in my case. I was not trying to get Miss.Nathan to lie on my behalf. I only wanted her to come to court to tell the truth. It was the Government's CI who threatened Miss.Nathan not to come to court on my behalf. I acted badly toward her, but my actions toward her did not serve to obstruct or impede justice. I wanted her to help me get jus- tice. I wanted her to tell the truth about my agreement to get the CI powdered cocaine. (Please see attached Memorandum of Law, pages 28 to 35.)

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ☒x

(2) If you did not raise this issue in your direct appeal, explain why: My appellate counsel provided deficient representation by failing to advise me of the availability of this claim and/or raising this claim on my behalf on direct appeal.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

    Yes ☐  No ☒X

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

    Yes ☐  No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

    Yes ☐  No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

    Yes ☐  No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: As stated, my appellate counsel simply failed to raise this claim, even though I had timely objected in the District Court and so had preserved the issue on appeal.

_____

_____

**GROUND THREE:** WHETHER MOVANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL ON DIRECT APPEAL FOR FAILURE TO RAISE CLAIM PRESERVED FOR APPEAL?

**(a) Supporting facts** (Do not argue or cite law. Just state the specific facts that support your claim.): In the District Court, prior to sentencing, I filed a Motion to Withdraw Guilty

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Plea. My request was based on the fact that Attorney Villalobos and I had not been able to communicate with each other in any meaningful way as regards the charges against me. He had not provided me with even a copy of the indictment nor any discovery material prior to inducing me to sign a plea agreement in which I admitted to a charge involving crack cocaine when I had not been in- volved in any agreement concerning crack cocaine. After I got discovery, I still did not know what the information meant in terms of whether or not I should plead guilty or go to trial. My counsel did not help me understand. See Memorandum.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐  No ☒xx

(2) If you did not raise this issue in your direct appeal, explain why: ___My appellate counsel failed to raise this claim on my behalf and was ineffective.___

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐  No ☒xx

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐  No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐  No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐  No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

    Yes ❏  No ❏

(4) Did you appeal from the denial of your motion, petition, or application?

    Yes ❏  No ❏

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

    Yes ❏  No ❏

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this

issue: _____

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13. Is there any ground in this motion that you have <u>not</u> previously presented in some federal court? If so, which

    ground or grounds have not been presented, and state your reasons for not presenting them: I have not

    previously raised Ground One because of ineffective assistance of trial and

    appellate counsels. I raised Grounds Two & Three in the District Court, but

    my appellate counsel failed to raise the issue anew on direct appeal.

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14. Do you have any motion, petition, or appeal <u>now pending</u> (filed and not decided yet) in any court for the

    judgment you are challenging? Yes ❏  No ☒xx

    If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the

    issues raised. _____

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15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: __Piyush Chandra; James A. Graham; Raul Villalobos – 1620 West 18th Street; Chicago, Illinois 60608.__

(b) At arraignment and plea: _____ Raul Villalobos. _____

(c) At trial: _____ (no trial) _____

(d) At sentencing: _____ Raymond L Prusak _____

(e) On appeal: _____ Andrew J. McGowan; Federal Public Defender's Office 401 Main Street, Suite 1500; Peoria, Illinois 61602

(f) In any post-conviction proceeding: _____ N/A _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____ N/A _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒xx

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?　　　Yes ☐ No ☒xx

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future?　　Yes ☐ No ☐

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18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain
why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255,
paragraph 6, provides in part that:
　　A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from
　the latest of —
　　　　(1) the date on which the judgment of conviction became final;
　　　　(2) the date on which the impediment to making a motion created by governmental action in violation of the
　　　　Constitution or laws of the United States is removed, if the movant was prevented from making such a
　　　　motion by such governmental action;
　　　　(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been
　　　　newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
　　　　(4) the date on which the facts supporting the claim or claims presented could have been discovered through
　　　　the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: <u>remand for resentencing or an</u> <u>evidentiary hearing as to Ground One; a remand for further proceedings as</u> <u>to Grounds Two & Three;</u> _____

or any other relief to which movant may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ *NOVEMBER* _____ _____ *20th, 2007* _____ (month, date, year).

Executed (signed) on ___ *11/20/07* ___ (date).

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

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